Supreme Court, U.S.
FILED
NOV 23 2009
OFFICE OF THE CLERK

Nos. 08-1498 and 09-89

IN THE

Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

HUMANITARIAN LAW PROJECT, ET AL.,
Respondents.

HUMANITARIAN LAW PROJECT, ET AL.,
Cross-Petitioners,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* VICTIMS OF THE MCCARTHY ERA, IN SUPPORT OF HUMANITARIAN LAW PROJECT, ET AL.

Stephen F. Rohde
Rohde & Victoroff
1880 Century Park East
Suite 411
Los Angeles, CA 90067
(310) 277-1482

John A. Freedman
(*Counsel of Record*)
Jonathan S. Martel
Jeremy C. Karpatkin
Bassel C. Korkor
Sara K. Pildis
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000
Attorneys for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*

Amici are 32 individuals and the close family members of individuals who were subject to criminal penalties, a "blacklist" that precluded them from employment in their professions, or other governmental and social sanctions during the "Red Scare" from the 1930s to the 1960s, and especially during the "McCarthy Era" of the 1950s. They were punished for their lawful activity in or association with organizations the government labeled as subversive. Some *Amici* were punished, and even imprisoned, for refusing to testify before congressional committees. Some lost their jobs for failure to testify before state investigative bodies. Some were unable to find work in their field for years. Some left the country because they could not find work or because they feared prosecution. In many cases, the persecution included harassment of the family members and children of the targeted individuals. *Amici* have a strong interest in ensuring that these excesses are not repeated, that political speech is not quashed, and that dissenting individual views and associations are protected. Their stories are described in the Appendix to this Brief.[1]

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[1] Counsel for a party did not author this brief in whole or in part, and no person or entity, other than the *amici curiae* or counsel, have made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37 of the Rules of the Supreme Court, the parties have consented to the filing of this brief, and copies of the consents have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Sections 302 and 303 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 8 U.S.C. §§ 1189 and 2339B, recreate the kind of criminal penalties for free speech and association that *Amici* and their families unjustly suffered more than fifty years ago. AEDPA authorizes the Secretary of State to designate "foreign terrorist organizations," and makes it a crime to provide certain statutorily defined "material support" for even the nonviolent and humanitarian activities of such groups. *Id.* Similar to the Smith Act and federal executive orders in the 1940s and 50s, AEDPA grants the Executive Branch unreviewable discretion to designate groups as "terrorist." AEDPA further creates vague bans on providing "expert advice or assistance," "training," "service," or "personnel" to designated groups. It threatens once again unconstitutionally to interfere with the rights of free speech and association.

AEDPA's vague ban on "assistance" and "advice" is essentially no different from the McCarthy Era attempt to root out association with and advocacy for groups unpopular with the government. Starting in the 1930s, and through the 1960s, Congress and the Executive Branch identified organizations -- the Communist Party and groups identified as having ties to the Communist Party -- as using illegal means, including terrorism, with the aim of overthrowing the United States Government by force and violence. The Smith Act and the Subversive Activities Control Act made it a crime to associate with these designated groups or to speak in support of these groups. These were crimes

regardless of whether or not that speech or association supported or furthered the group's unlawful activities.

Our society now recognizes that the McCarthy Era was a shameful episode in American history, characterized by widespread abuses of executive and legislative power and fueled by demagoguery and overzealous government action, ultimately encompassing "loyalty" investigations of over four million American citizens. *See, e.g.,* Ellen Schrecker, *Many Are the Crimes: McCarthyism in America* (1998), at x (The McCarthy Era is "the most widespread and longest lasting period of political repression in American history.").

While few individuals were ultimately prosecuted under the McCarthy Era laws, thousands were persecuted. Among the latter, larger group were *Amici* and their relatives, none of whom intended to or actually did engage in violence against this country. Nonetheless, they were investigated, libeled, terminated from and unable to secure employment, blacklisted, prosecuted, and imprisoned. One of the key lessons from this era is that when the federal government fans the flames of public passion by enacting overreaching criminal statutes, staging congressional hearings, and investigating the loyalty of millions of American citizens, it implicitly condones and sanctions retributions against individuals, such as *Amici.* Eventually, our society and this Court understood that these consequences were unacceptable. We should not make these mistakes again.

It is against this background that this Court issued the decisions that are the controlling law that governs this case. In a series of landmark First Amendment decisions, this Court struck down these statutes, restored freedom of speech and halted guilt by association. This Court concluded that the congressional and executive branch excesses were unconstitutional. The Court held that punishing speech without showing incitement to crime and punishing association without showing specific intent to further illegal ends penalizes innocents and chills the political freedoms at the very core of our democracy.

These principles are equally applicable today, where the federal government (once again) has designated certain organizations as proscribed and purports to make it a crime to speak for or otherwise associate with such organizations. Now, when once again our safety and security have been threatened, this Court should reaffirm the rights to free speech and association.

ARGUMENT

I. AMERICANS PAID A HEAVY PRICE FOR MCCARTHY ERA PENALTIES ON SPEECH AND ASSOCIATION.

In periods of serious external threats to our Nation, the political branches of our government have sought to root out and punish individuals and organizations based on association with those designated as enemies of the State, even if such association was through constitutionally protected speech and activities. *See generally*, Geoffrey R.

Stone, *Perilous Times: Free Speech in Wartime, from the Sedition Act of 1798 to the War on Terrorism* (2004). Beginning after the Bolshevik Revolution of 1917 and the establishment of a communist government in Russia, there was a period of fear and paranoia in America that international communism might destroy this country. In the 1950's, Senator Joseph McCarthy became among the most vocal and visible proponents of government investigations into individual citizens' affiliations with, or sympathies for, Communism. At the height of the McCarthy Era, the House Committee on Un-American Activities ("HUAC") held hearings in which individuals were publicly interrogated about their mere association with, or speech in support of, an organization identified as "Un-American."

Amici personally paid the price for the restrictions on freedom of speech and policies of guilt-by-association during the McCarthy Era. Individuals suffered greatly from "blacklists" that arose out of such hearings: private businesses (including the entertainment industry) and government employers stopped employing and fired individuals who government authorities identified as linked to communists, and those who refused to cooperate were jailed on charges of contempt. *See generally* Schrecker, *supra* (1998). Those who were blacklisted included renowned artists, performers, and writers, including: *amicus* Irwin Corey, a well-known comedian and film actor; *amicus* Clifford Carpenter, a famous radio, television and film actor; entertainer Lionel Stander, father of *amicus* Bella Stander; composers E. Y. Harburg, step-father of *amicus* Roderic Gorney, and Jay Gorney, father of *amicus* Roderic Gorney and husband of *amicus*

Sondra Gorney; screenwriter Robert Lees, father of *amicus* Richard Lees; and actors John Randolph and Sarah Cunningham, parents of *amici* Harrison Randolph and Martha Eoline Randolph. Speech was chilled as people feared government penalties that led to social ostracization; at the height of the furor, few dared to speak out against violations of civil liberties. *Id.*

Ill-conceived unconstitutional restrictions on the freedoms of speech and association enacted to protect against the evils of communism furthered and legitimized this repression. The Smith Act made it a crime to advocate, advise, teach, or publish material espousing the "duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States . . . by force or violence," and prohibited organizing any group that teaches or advocates the "overthrow or destruction of any such government by force or violence." 18 U.S.C. § 2385. Significantly, the Smith Act even made it a crime merely to become a member of, or affiliated with, any such society or group. *Id.* The Smith Act resulted in more than one hundred prosecutions based on involvement with the Communist Party, Stone, Geoffrey, "Free Speech in the Age of McCarthy: A Cautionary Tale," 93 CAL L. REV. 1387 (2006), including *amicus* Paul Harris' uncle and Communist Party leader Fred Fine, whose brother-in-law Sydney Harris was also blacklisted and unable to find a job because he joined the Communist Party after fighting in the Spanish Civil War.

The federal government also issued executive orders to crack down on communism during the

McCarthy Era. On March 21, 1947, President Harry Truman issued Executive Order 9,835, requiring loyalty checks on federal employees. The Executive Order authorized the Attorney General to designate specific groups as "totalitarian, fascist, communist, or subversive" or dedicated to "force or violence." Exec. Order No. 9,835 at III. The program authorized government panels to investigate employees for "membership in, affiliation with, or sympathetic association with" any designated organization, and to place such employees' names on a "master index," and recommend them for dismissal from employment. Exec. Order No. 9,835 at V.2.6. The order afforded no individual or organization the right to contest the designation and there was no right to judicial review. By 1953, 254 organizations were included on the "subversive list." Stone, at 344. The procedures developed under the Truman loyalty program were the model for an expanded guilt-by-association policy, and thus "became standard within other federal agencies, state and local governments, and private institutions." Schrecker, at 274.

In 1953, President Eisenhower expanded the standard of "disloyalty" under Truman's program to include "any behavior, activities or associations which would tend to show that the individual is not reliable or trustworthy." Exec. Order No. 10450 (1953). "In their investigations of more than four million federal civilian employees, the government's two hundred loyalty boards did not uncover a single instance of actual espionage or subversive malfeasance." Stone, at 351. Historian Henry Steele Commager described the loyalty program as "an invitation to precisely that kind of witch-hunting which is repugnant to our constitutional system."

Commager, *Freedom and Order: A Commentary on the American Political Scene*, 73-74 (1966). The incitement and toleration of such personal persecution based on association and speech cast a chilling shadow on political discourse in America.[2]

The McCarthy Era spawned innumerable tales of hardships suffered by "political innocents whose jobs were lost and careers destroyed because they inadvertently associated with groups on the list." Schrecker, at 276. By the mid-1950s, "[l]oyalty programs, emergency detention plans, undercover surveillance, legislative investigations, and criminal prosecutions of Communists swept the nation." Stone, at 313. "Some 11,000 Americans had been fired for suspected 'disloyalty,' more than 100 had been prosecuted under the Smith Act, and more than 130 had been jailed for . . . refusing to cooperate with their interrogators." *Id* at 314.

Some courageous leaders -- including Corliss Lamont (husband of *amicus* Beth Keehner Lamont),

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[2] The men and women called to testify before congressional committees had been among the most active and vocal progressive individuals of that era.

> The repression unleashed against them essentially silenced their voices. They became preoccupied with their own defense. Grappling with a loyalty-security case, coping with unemployment, or fighting criminal charges or deportation left little time or energy for other political work. In addition, though these people certainly cared about peace, unionization, and racial equality, they feared that active involvement with such causes might only lead to more harassment.

Schrecker, 367-68.

who brought key cases to the Supreme Court; *amicus* Yolanda "Bobby" Hall, who challenged the constitutionality of HUAC and its subpoenas; and *amicus* Ann Fagan Ginger, who successfully contested a HUAC contempt citation -- emerged to challenge the worst of the excesses.

It is against this background that the Supreme Court's landmark First Amendment decisions of the 1950s and 1960s restoring freedom of speech and halting guilt by association should be assessed and applied in this case.

II. THE SUPREME COURT IN THE 1950s AND 1960s REJECTED MCCARTHY ERA 'GUILT BY ASSOCIATION' STATUTES AS IMPERMISSIBLE.

In the 1950s, at a time of national fear over the unprecedented threat posed by international communism, Supreme Court cases addressed the constitutionality of statutes and administrative action similar to AEDPA. Clear First Amendment and due process principles in those cases limit criminal liability for association with or advocacy on behalf of designated "subversive" organizations. These principles apply directly to AEDPA. AEDPA does not comply with them, and accordingly is unconstitutional.

A. AEDPA Penalizes the Relationship Between an Individual and a Designated Organization, in Violation of the Freedom of Association.

In the aftermath of the McCarthy Era, this Court established clear limits on civil or criminal "guilt by association," In *Scales v. United States*, 367 U.S. 203 (1961), this Court rejected the Membership Clause of the Smith Act and established two related limits directly relevant to AEDPA: (1) the Constitution bars a blanket prohibition on association with groups with legal and illegal aims; and (2) the Constitution requires that criminal sanctions be limited only to individuals who specifically intend to further a designated group's illegal aims.

1. Congress Cannot Impose a "Blanket Prohibition" on Association With Groups Having Legal and Illegal Aims.

In *Scales*, this Court explained: "A blanket prohibition of association with a group having both legal and illegal aims" would create "a real danger that legitimate political expression or association would be impaired." *Id.* at 229. That same day, the Court also held that convictions under the Membership Clause of the Smith Act require the strictest possible standards, due to the danger that an individual supporting only the lawful aims of an organization "might be punished for his adherence to lawful and protected purposes, because of other and unprotected purposes which he does not necessarily share." *Noto v. United States*, 367 U.S. 290, 299-300 (1961).

In later cases, the Court affirmed and expanded this essential doctrine that association with a proscribed organization by itself cannot justify criminal liability. *See Elfbrandt v. Russell,* 384 U.S. 11, 19 (1966) (concluding that an Arizona law barring Communist party members from teaching in Arizona schools "infringes unnecessarily on protected freedoms" and "rests on the doctrine of 'guilt by association.'"); *Keyishian v. Bd. of Regents of the Univ. of the State of New York*, 385 U.S. 589, 607 (1967) (holding that even membership in the Communist Party by an individual with knowledge of the Party's unlawful goals "cannot suffice to justify criminal punishment.") (*citing Scales*).

AEDPA, in effect, similarly imposes a "blanket prohibition" on association with designated organizations (*i.e.*, whoever the government specifies), and would render conduct criminal on little more than a "guilt by association" theory. The statute prohibits individuals from interacting with the designated organizations in ways that advance legal aims of the organizations, such as providing training or expert advice on international human rights law or political advocacy, teaching community organizing, or providing instruction in principles of non-violent resistance. Indeed, the sweep of the statute is so vast that it potentially encompasses activities that neither "support" a group nor are "material." Criminalizing broad categories of "training," "expert advice," or "service" certainly encompasses activities that are not "material," and accordingly, there is no discernible difference between "material support" and mere association. As such, AEDPA criminalizes behavior that

promotes the group's "lawful and protected purposes," contrary to *Scales* and *Noto*.

2. The Government Must Prove that Individuals Intend to Further the Illegal Aims of an Organization.

This Court in *Scales* noted that requiring proof of an individual's specific intent to support the illegal aims of a proscribed organization is a corollary of the principle that the government may not impose a "blanket prohibition" on association with proscribed organizations. The Court explained:

> In our jurisprudence, guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

Scales, 367 U.S. at 224-25.

The Court construed the Smith Act Membership Clause as not rendering "criminal all association with an organization which has been shown to engage in illegal advocacy" but requiring "clear proof that a defendant 'specifically intend(s) to accomplish (the aims of the organization) by resort to

violence.'" *Id.* at 229 (*citing Noto,* 367 U.S. at 290). A conviction is only appropriate where the government puts forward "proof that [the defendant] knew that the organization engaged in criminal advocacy, and that it was his purpose to further that criminal advocacy." *Id.* at 227, n.18.

The Court has repeatedly reaffirmed this specific intent requirement. *See Elfbrandt,* 384 U.S. at 19 ("A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms" and "rests on the doctrine of 'guilt by association' which has no place here."); *Keyishian,* 385 U.S. at 608 ("[L]egislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates the constitutional limitations."); *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 920 (1982) ("civil liability may not be imposed merely because an individual belonged to a group . . . . For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.").

Indeed, in the face of this long line of cases, the government eventually acknowledged in defending McCarthy Era statutes that it was required to demonstrate "specific intent," a requirement it now disavows in defending AEDPA. For example, in *United States v. Robel,* 389 U.S. 258 (1967), in defending the provision of the Subversive Activities Control Act allowing summary termination of employees of defense contractors, the

government acknowledged that specific intent was required for criminal convictions, stating flatly that to treat "association, in and of itself, as criminal conduct . . . would conflict squarely with the First Amendment." *See* Appellant United States Br. at 47-48, *Robel, supra*.[3]

AEDPA makes association a crime without regard to the specific intent of the individual to support the illegal activities of a designated organization. It violates this crucial constitutional requirement that this Court established in the McCarthy Era cases and that applies with equal force today.

B. Like McCarthy Era Statutes, AEDPA Makes Constitutionally Protected Speech a Crime and is Unconstitutionally Vague, Chilling Free Speech.

1. AEDPA Unconstitutionally Penalizes Protected Speech in the Same Manner as McCarthy Era Laws.

In challenges to the application of the Smith Act, this Court found that advocating or teaching the violent overthrow of the government, even with an evil intent, is protected speech as long as it is "divorced from any effort to instigate action to that

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[3] The Court was unpersuaded by this distinction, and struck the statutory scheme in *Robel* as unconstitutional, because the bar on employment "literally establishe[d] guilt by association alone, without any need to establish that an individual's association pose[d] the threat feared by the Government in proscribing it." *Robel*, 389 U.S. at 264-65.

end." *Yates v. United States*, 354 U.S. 298, 318 (1957); *see also id.* at 331. Even where individuals have advocated for the overthrow of the United States Government, that speech is protected unless "the speech or publication created a 'clear and present danger' of attempting or accomplishing the prohibited crimes. . . ." *Dennis v. United States*, 341 U.S. 494, 505 (1951).

The Court elaborated the standard for evaluating legislative restrictions on teaching and advocacy in *Brandenburg v. Ohio,* 395 U.S. 444 (1969). In *Brandenburg*, the Court struck down the Ohio Criminal Syndicalism Act because the act punished "mere advocacy," even though the speech advocated illegal activity. The Ohio Criminal Syndicalism Act, which was nearly identical to similar laws adopted by 20 states, punished persons who "advocate or teach the duty, necessity, or propriety" of violence as a means of "accomplishing industrial or political reform...." Ohio Rev. Code Ann. § 2923.13 (1969). The Court, overruling its previous decision in *Whitney v. California,* 274 U.S. 357 (1927), held that the government cannot penalize advocacy or teaching of the use of force or violating the law unless it can prove that the speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447.

As interpreted by the government, AEDPA makes association a crime, including teaching or advocating on behalf of any designated organization, and AEDPA is strikingly similar to the language of the Smith Act and the Ohio Criminal Syndicalism Act. On its face, AEDPA prohibits speech that is not

"directed to inciting or producing imminent lawless action" and is not likely to "incite or produce such action." *See* 8 U.S.C. §§ 1189, 2339B. Furthermore, the speech that AEDPA prohibits is speech advocating lawful activity, and the Court in cases such as *Dennis* and *Brandenburg* disapproved statutory interpretation that allowed the government to restrict speech advocating even unlawful activity. For example, AEDPA prohibits the teaching of law or human rights, or providing advice on water sanitation to designated organizations. The statute even apparently bars drafting an *amicus* brief in support of a designated organization or advocating on behalf of a designated organization before the United States Government or the United Nations.

Whether or not the executive branch has concluded that an organization engages in illegal conduct, the First Amendment protects the rights of individuals to speak, teach or provide advice to such organizations -- certainly where such speech is in furtherance of non-violent or other legal aims of the organization. *Cf. De Jonge v. Oregon* 299 U.S. 353 (1937) (reversing conviction under Oregon criminal syndicalism law of individual who helped organize Communist Party meeting in 1934); *Claiborne Hardware Co.*, 458 U.S. at 908 (individuals who advocate on behalf of an organization do "not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected."). Such groups may be unpopular. But the First Amendment protects even those who speak to or on behalf of unpopular organizations.

2. AEDPA Chills Protected Speech.

During the McCarthy Era, fear of enforcement of statutes such as the Smith Act and the Ohio Criminal Syndicalism Act caused individuals to refrain from engaging in protected speech or associating with designated organizations. Likewise, here, AEDPA creates the danger of chilling the exercise of First Amendment rights.

In *Keyishian*, *supra* the Court found unconstitutionally vague a New York statute making "treasonable" or "seditious" words or acts grounds for removal from state employment. *Keyishian*, 385 U.S. at 597-99, N.Y. EDUC. LAW §§ 3021, 3022; N.Y. CIV. SERV. LAW § 105. In striking down the statute, the Court found that the "First Amendment freedoms need breathing space to survive..." and emphasized the danger of a "chilling effect upon the exercise of vital First Amendment rights."[4]

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[4] A challenge to a statute based on vagueness grounds requires the court to consider whether the statute is "sufficiently clear so as not to cause persons 'of common intelligence ... necessarily [to] guess at its meaning and [to] differ as to its application.' *Connally v. General Constr. Co.*, 269 U.S. 385, 391(1926).

In *Keyishian*, the Court found that no state employee "can know just where the line is drawn between 'seditious' and nonseditious utterances and acts." *Id.* at 599. The same New York statute prohibited state employment by any person who "advocates, advises or teaches the doctrine" of forceful overthrow of the government. *See* N.Y. EDUC. LAW §§ 3021, 3022; N.Y. CIV. SERV. LAW § 105. The Court found that "[t]his provision is plainly susceptible of sweeping and improper application. It may well prohibit the employment of one who merely advocates the doctrine in the abstract without any attempt to indoctrinate others or incite others to action in furtherance of unlawful claims." *Keyishian*, 385 U.S. at 599.

Keyishian, 385 U.S. at 604. *See generally, NAACP v. Button*, 371 U.S. 415 (1963) ("the threat of sanctions may deter [the exercise of First Amendment Rights] almost as potently as actual application of the sanctions").

Local and state governments relied on statutes similar to New York's to terminate numerous dedicated teachers across the United States without any evidence of unlawful or violent activity. *Amicus* Irving Adler and Samuel Wallach (father of *amicus* Joan Wallach Scott), were fired from New York City teaching jobs for resisting inquiries into their political beliefs; *amicus* Chandler Davis lost his teaching job at the University of Michigan after refusing to testify and was imprisoned after being cited for contempt of Congress; *amicus* Henry Foner was denied a teaching license and his three brothers lost their New York teaching jobs after their "loyalty" testimonies; *amicus* Lee Lorch lost his position at Fisk University for refusing to answer HUAC's questions; Yetta Stromberg, great-aunt of *amicus* Judy Branfman was fired from teaching positions with UCLA and Los Angeles public schools; renowned philosopher Barrows Dunham, father of *amicus* Clarke Dunham, lost his position at Temple University; Frank and Jean Wilkinson, parents of *amicus* Jo Wilkinson, lost their jobs after refusing to testify before a California committee; and Dr. Robert Hodes, father of *amicus* Peter Hodes was fired from Tulane University and had to move abroad to continue his career.

Even children were not immune from the chilling effects of such restrictions on speech and

association: FBI agents questioned classmates and playground friends of *amici* siblings Ernst and Jessica Benjamin when they were schoolchildren, because their parents Herbert and Lillian Benjamin had been blacklisted.

AEDPA similarly creates fear of prosecution for groups and individuals today who would lawfully advocate on behalf of designated organizations or provide those organizations with advice and training relating to lawful activities. In 1951, when HUAC agents attempted to subpoena them, *amici* Jean and Hugo Butler chose to flee to Mexico to avoid arrest. *Amicus* Walter Bernstein, a blacklisted writer in the 1950s, was forced to write under a pseudonym. Screenwriter Michael Wilson, father to *amici* Becca Wilson and Rosanna Wilson-Farrow, had to write "under the table" and did not receive credit for his work, including Oscar-winning films *Bridge Over the River Kwai* (1957) and *Lawrence of Arabia* (1952). Hollywood Ten screenwriters Sam Ornitz, father-in-law of *amicus* Hilda Ornitz, and Adrian Scott, husband, uncle, and great uncle of *amici* Joan Scott, Aemelia Scott, Adam Scott, and Douglas Scott, served nine months in prison and had their careers destroyed for refusing to testify before HUAC.

Like the statutes in *Keyishian*, AEDPA "is plainly susceptible of sweeping and improper application." *Keyishian*, 385 U.S. at 599. The chilling effect on lawful speech is reminiscent of the McCarthy Era where people feared speaking on behalf of or associating with designated groups in part because it was unclear what speech might trigger government action.

The Court should protect those who want lawfully to exercise their First Amendment rights from this sort of vague statute that uses ill-defined and undefined terms to make speech a crime.

C. National Security Concerns Cannot Justify Infringements on Freedom of Association.

The government defends AEDPA on national security grounds. *See Petition for Writ of Certiorari*, at 11 (citing congressional findings that "international terrorism is a serious and deadly problem that threatens the vital interests of the United States"). When the government argued in the 1940s, 50s, and 60s that the national security threat posed by international communism justified infringements on rights of speech and association, this Court closely scrutinized such claims to ensure that the means are narrowly tailored to serve the national security interest. As this Court noted then, "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit." *Robel*, 389 U.S. at 263.

In *Robel*, the government argued that the threat of international communism in the aftermath of the Korean War made it "plain beyond all doubt that communism has passed beyond the use of subversion to conquer the independent nations and will now use armed invasion and war." Government Br. at 22, *Robel*, *supra* (cites and quotes omitted). The government contended that the Communist Party "can no longer be viewed passively as a group of mere political and ideological dissidents, but must be looked upon with all seriousness as a military

fifth column actively aiding our enemies." *Id.* at 22. The government cited congressional reports warning of "sabotage" by "hard-core Communists" "which action would coincide with surprise attacks on the country." *Id.* at 26. The government even invoked the now-discredited arguments of *Hirabayashi v. United States,* 320 U.S. 81 (1943) (upholding imposition of a blanket curfew only on Japanese Americans during World War II, absent any evidence of individual guilt or misconduct) to claim that it was owed "the very broad discretion which has traditionally been vested in the legislative and executive branches of government in the area of war and national defense." *Robel* Br. at 29-30 (times of war "call for the exercise of judgment and discretion and for the choice of means by those branches of government on which the Constitution has placed responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs").[5]

In the face of these claims, this Court responded:

> [The] concept of national defense cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term national defense is the notion of defending

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[5] The doctrine of *Hirabayashi* has been widely discredited as an abdication of the Court's historic defense of constitutional rights. *See, e.g., Hirabayashi v. United States,* 828 F.2d 591, 593 (9th Cir. 1987).

> those values and ideals which set this nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in the Constitution, and the most cherished of those ideals is found in the First Amendment. It would be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties -- the freedom of association -- which makes the defense of the Nation worthwhile.

Robel, 389 U.S. at 263-64.

The *Robel* Court concluded that despite the government's broad invocation of national security, the "means the Government has chosen to implement" its purpose was not narrowly tailored and violated the right to free association, because the government was not required to prove that any individual in fact engaged in any activity that posed a risk to national security: "The statute quite literally establishes guilt by association alone, without any need to establish that an individual's association poses the threat feared by the government in proscribing it." *Id.* at 265. Likewise here, AEDPA punishes speech without a showing of incitement to crime, and it punishes association with designated organizations without establishing that an individual's association poses a threat. As such, AEDPA is not narrowly tailored to serve an interest in national security and is unconstitutional.

CONCLUSION

For all of the above reasons, and in accordance with the request of Plaintiffs Humanitarian Law Project et al., the Court should affirm the court of appeals' decision with respect to the provisions it held invalid as applied to plaintiffs' speech, and reverse the court's decision with respect to the provisions it upheld.

Respectfully submitted,

John A. Freedman
(*Counsel of Record*)
Jonathan S. Martel
Jeremy C. Karpatkin
Bassel C. Korkor
Sara K. Pildis
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Stephen F. Rohde
Rohde & Victoroff
1880 Century Park East
Suite 411
Los Angeles, CA 90067
(310) 277-1482

Attorneys for *Amici Curiae*